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Trusting the Mediation Process

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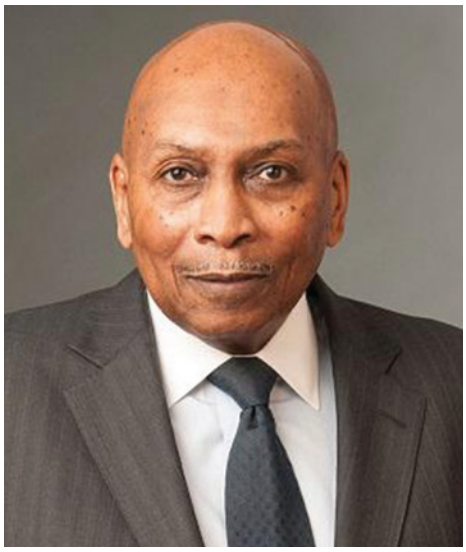
The Constitution of the State of Georgia requires the judicial branch of government to provide "speedy, efficient, and inexpensive resolution of disputes" (Article VI, Section IX, Paragraph I). I am certain that the goals of speed, efficiency and inexpensive resolution are shared by every court in this country. Both court-annexed and private mediation services are necessary and effective vehicles to assist the courts to achieve these goals. Consistent with the experience of many civil litigation trial lawyers, over my almost 40 years of trial experience, I participated in hundreds of single-party and multi-party mediations in many jurisdictions throughout the U.S. Most of those mediations resulted in an efficient and less expensive resolution of cases scheduled for trial. However, there were occasions when cases that should or could have been resolved did not settle because of a failure to trust the mediation process. As officers of the courts, we lawyers have an obligation to assist the courts to achieve their goals by doing the necessary preliminary work to improve the chances for successful mediations.

In my experience, successful mediations are more likely to occur when the parties prepare for the mediation by, at a minimum, doing the following:

- Understanding the strengths and weaknesses of the facts, evidence and the likely witness testimony regarding those facts and evidence
- Conducting the discovery necessary to ensure that your evaluation of the facts and evidence is realistic
- Evaluating the potential jury pool (e.g., does the court



where the case will be tried have a history of plaintiff- or defense-leaning jurors?)

- Evaluating the impact of potential pretrial court rulings, appellate issues and any other unique case issues upon the settlement value of the case
- Selecting a mediator who refuses to simply be a message carrier between the parties and demonstrates a commitment to be an active neutral focused upon helping the parties to fairly evaluate the impact of the relevant case

factors upon their respective settlement positions

- Sensitizing clients and other stakeholders to the impact of the above issues on the success of the mediation process

Although the above factors are essential, the most important factor contributing to a successful mediation is the willingness to trust in the process. To improve the chance of success, each party participating in a mediation must trust that their opposition has conducted a good-faith analysis of the relevant case factors. The American Psychological Association's Dictionary of Psychology defines "trust," in part, as "the degree to which each party feels that they can depend on the other party to do what they say they will do."

That trust is essential. In my experience, the failure to perform the necessary work to evaluate a case challenges the basic foundation for trust, and often results in bad-faith gamesmanship demonstrated by unreasonable settlement demands and responses by both plaintiffs and defendants during the negotiation process.

We all have experienced the delays caused by the trial backlogs created by the pandemic. I think Christopher Brasher, chief judge of the Superior Court of Fulton County (Georgia), had a keen observation when he said that it is "harder to move civil cases when there is not a trial at the end of the process" (*The Daily Report*, Jan. 12, 2021).

One silver lining of the pandemic, however, is that the trial backlogs have forced a large number of litigants to pursue mediation in an attempt to resolve their cases in a reasonable period of time. Consequently, many of those parties are demonstrating a firm grasp of the relevant case factors and are focused upon realistic evaluations of those factors. Accordingly, as the courts begin to work through the backlog of trials, let's continue to rely upon, thoroughly prepare for and trust the mediation process in an attempt to achieve speedy, efficient and less expensive resolutions of disputes.

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